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THE DOCTRINE OF PUBLIC POLICY AS APPLIED TO OWNERSHIP OF REAL ESTATE BY FOREIGN CORPORATIONS.

A STATE may, by legislative enactment, directly and expressly prohibit a foreign corporation from taking or holding land within its borders. But, in the absence of such an enactment, is it for the courts to lay down a prohibitory rule, — and, if so, under what circumstances?

Little is to be found upon this subject in the text-books, and the number of cases in which it has been considered is quite limited. Yet the question is of great practical importance, when boundary lines must be looked to, in passing on the right of a corporation to purchase or become the devisee of lands.

It is elementary that a corporation of one State may not exercise its powers in another State, without the express or implied consent of the latter, and that the right to hold and the mode of acquiring title to land depends upon the local law of the territorial sovereignty; but under what conditions may the courts, speaking for the State, withhold the requisite consent, and what are the guiding rules under which the local law is to be determined in the case stated?

In Bank of Augusta *v.* Earle,[1] Chief-Justice Taney quotes with approval the proposition laid down in Story's "Conflict of Laws,"

[1] 13 Peters, 519.

that "in the absence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests." He then goes on to say, that "whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered injurious to its interests, the presumption in favor of its adoption can no longer be made."

In the Girard Will Case,[1] Mr. Justice Story observes that, in seeking to discover the public policy of a State, the court is limited to what "its constitution and laws and judicial decisions make known to us."

In a case[2] involving the legality of a certain devise of real estate to a foreign corporation, Mr. Justice Harlan states the law thus: "In harmony with the general rule of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its higher courts."

The authorities thus quoted are sufficient to show that, notwithstanding the absence of a direct prohibitory statute, the courts of a State may deny the power of a foreign corporation to take and hold real estate within its limits, although authorized thereto by the law of its creation, but that the right to do so depends entirely upon the public policy of the State on the subject, which the courts are to ascertain from the proper sources, and not themselves to inaugurate. The statement that the policy of a State on any given subject is to be sought in its judicial decisions, as well as in its statutes, obviously does not imply that the judicial tribunals of a State may originate such policy; coming from a Federal court, it means merely that when a judicial definition of State policy, based upon a construction of constitutional or statutory provisions, has been made by the local court, it will be accepted and followed by the Federal court in cases to which such provisions apply.

The public policy of the State to be sought and applied is not

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[1] 2 Howard, 127.

[2] Christian Union *v.* Yount, 101 U. S. 352.

that public policy defined to be the principle of law which holds that no subject or citizen can lawfully do that which is injurious to the public or against the public good,[1] — a principle, the application of which has not infrequently led to judicial legislation, and which, it has been said, "is never argued at all but when other points fail." Apply this rule to the subject in hand, and the result will depend upon what, as a matter of sound policy, a given court thinks the law ought to be, and not upon what the law actually is.[2] Instances are not wanting in which courts have inclined to believe they might properly do this. For example, Mr. Justice Christiancy, of the Supreme Court of Michigan,[3] enumerates certain consequences which he thought might result from permitting foreign corporations to acquire real property in that State: —

"1. The danger of their becoming speculators in lands to large amounts, keeping them unimproved, or introducing a system of tenancies in which the tenants would be in a great measure dependent upon such corporation.

"2. The holding of such lands for a long period of time, as they pass by perpetual succession without any change or break by death, as in the case of natural persons.

"3. The influence which wealthy corporations holding large bodies of land in the State might exercise upon the legislature."

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[1] Lord Brougham in the Bridgewater Will Case, 4 H. L. Cases, 1.

[2] Two amusing instances of the extent to which judges have permitted their views of what is contrary to public policy, or the public good, to influence their judgment, may be cited. In King *v.* Waddington, 1 East, 143, the defendant was sentenced to fine and imprisonment for contracting for one fifth of the hop product of two counties, as a speculation, with the view to raise the price by telling sellers that hops were too cheap, and planters that the price was too low. It was held that this was against public policy, and Grose, J., in delivering the opinion of the court, said: "It would be a precedent of most awful moment for this court to declare that hops, which are an article of merchandise, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by undue means to enhance."

In Locke's Appeal, 72 Penn. 491, the court, by a majority opinion, sustained the constitutionality of a local option liquor law. Mr. Justice Read, in the course of a dissenting opinion, expressed himself as follows: "The question of license or no license is to be submitted to the citizens of Philadelphia at the general election in October, and if the vote is against license, then the city will be under a prohibitory liquor law during the whole Centennial celebration to which we have invited the whole country. On the 4th July, 1776, every patriot drank to the independence of the thirteen States; shall it be that on the 4th July, 1876, all we can lawfully offer to our guests on this great anniversary will be a glass of Schuylkill water, seasoned with a lump of Knickerbocker ice? I believe in moral suasion as the true means of advancing the temperance cause; but I do not believe in a prohibitory law which would reduce us to the condition of Boston."

[3] Thompson *v.* Waters, 25 Mich. 214.

He then goes on to say: "They are all very proper considerations for a constitutional convention in framing the fundamental law, and for the people in adopting it, as well as for the legislature, who, in all matters not fixed by the Constitution, are properly vested with the power of determining the public policy; and in a case where it should very clearly appear to the court, from the amount of the lands purchased, or the purposes for which they were purchased, or other circumstances, that the dangers mentioned were seriously to be apprehended, it may be that the court would be authorized, without any legislative prohibition to that end, to refuse to recognize the law of the State creating the corporations, or so much of it as had undertaken to confer the right of holding such lands."

No case, however, it is believed, can be found in which a court of last resort has denied the right of a foreign corporation to hold real estate, as against public policy, solely because in the opinion of the court the exercise of such a right would be injurious to the public, or prejudicial to the interests of the State. On the other hand, whenever the question has been directly presented, the authority to make a decision on such a ground has been disclaimed. Thus, in an early New Hampshire case,[1] it was objected that a banking corporation established in Massachusetts had no right to hold and convey real estate in New Hampshire. The court, in overruling the objection, said: "If any evil is to be apprehended in this respect, the remedy for the correction of it lies not with us." And in an Ohio case,[2] the Chief Justice of that State said: "There is nothing in the legislation of this State to limit the general capacity of the Bible Society to take by devise real estate in Ohio. There are no statutes of mortmain in this State. For myself, I heartily wish there were. But we must declare the law as we believe it to be."

In recognition of the danger that courts in applying the doctrine of public policy may act legislatively, and not judicially, the modern decisions, while maintaining it to be the duty of the courts to keep in sight the public good, set bounds to the domain within which this duty is to be exercised.[3] It would seem that outside of certain well-defined classes of acts which under the common law are contrary to public policy, — as, for example, contracts in re-

[1] Lumbard *v.* Aldrich, 8 N. H. 31.

[2] American Bible Society *v.* Marshall, 15 Ohio St. 537, 544.

[3] Anson on Contracts (6th ed.), 192.

straint of trade, injurious to the public service, to prevent the course of justice, or contrary to good morals, — the public policy which the courts are justified in invoking is that only which is clearly manifested by the legislation or fundamental law of the State. The buying and selling or holding of real estate by a foreign corporation does not fall within any of the classes of acts referred to. Accordingly, if it is forbidden by the public policy of a State, that policy must have been established by the law-making power of the State. It does not originate in the judicial tribunals. It is drawn solely from the constitution and statutes, and it is only by reference to their general scope that it is discovered and announced by the courts. It is the policy of the legislative, not of the judicial, department of the government. In the language of the New York Court of Appeals: "The rules of comity are subject to local modification only by the law-making power; until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure it is the duty of the courts to respect until the sovereign sees fit to deny them."[1] This proposition, of course, is subject to the condition that the business to be transacted is such as a natural non-resident person might lawfully transact in the State.

In the absence, therefore, of a prohibitory law, or of legislative or constitutional provisions from which a settled policy to the contrary may fairly be deduced, the courts should be bound by the law of comity, and recognize the right of a foreign corporation, authorized thereto by the law of its creation, to acquire and hold lands within the State.

The modern attitude of legislatures and courts toward foreign corporations is such that there is little occasion to consider the public policy of a State in the matter of lands acquired by corporations of another State, to be held merely as incidental to the carrying on of a legitimate business, — as, for example, real estate devoted by the corporation to the purposes of a railroad or manufacturing industry, or used as a warehouse or store in the carrying on of the corporate business. The subject assumes importance only in connection with corporate ownership of lands held purely as a direct source of pecuniary gain or income, as in the case of land companies, and religious, educational, and charitable institu-

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[1] Merrick *v.* Santvoord, 34 N. Y. 208. See also Hollis *v.* Drew Seminary, 95 N. Y. 166; Band *v.* Poole, 12 N. Y. 495; Lancaster *v.* A. I. Co., 140 N. Y. 576, 592.

tions holding real estate for the revenue to be derived therefrom. Without doubt it would not contravene the policy of any State if a manufacturing corporation should acquire real estate therein, to be used as a factory in the prosecution of the corporate enterprise, or if a foreign mercantile corporation should purchase a building in which to display and vend its goods. But in the case of land companies, whose sole purpose is to deal in lands, and corporations having the power to take real estate to hold as they hold stocks and bonds, merely for the resulting gain or income, a different question is presented. In some States, an apprehension that the recognition of the powers of such corporations might lead to monopolies in agricultural or mining lands, and discourage or prevent their settlement or development, or tend to establish landlordism, has manifested itself in legislation from which a policy hostile to the acquisition of real estate by such corporations might be deduced.[1]

In some States, the spirit of the ancient mortmain laws of England has been invoked to influence legislation in this matter.[2] In other States, a liberal policy, which imposes no restriction, has been adopted.

It seems to be settled that the policy of a state upon this subject, if it is to be applied by the courts, must appear affirmatively. It is not to be inferred from the mere absence of legislation. As

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[1] It is said that twenty million acres of land in the United States are owned in England and Scotland. A syndicate composed of foreign capitalists, and known as the Texas Land Union, is reported to own whole counties in Texas, and to have thousands of persons as tenants. It has been shown, however, in a recent article, by Mr. J. R. Dodge, the statistician, that much has been said of the tendency to land monopoly and landlordism which the facts do not warrant. A comparison of results of the tenth and eleventh censuses shows that in 1890 of the farms of the country 71.63 per cent were cultivated by the owner, against 74.42 per cent in 1880; and the increase in farms rented during the ten years succeeding the census of 1880 was only 1.92 per cent of all. This increase is accounted for to quite an extent by natural causes. For example, in the South, the increase of tenant farming is largely due to free labor, the division of plantations, and share rental to freedmen, — a change more nominal than real, as the planter is quite as much a partner as a landlord, having often to furnish horses and implements, seed and food as well as land. In the West it appears that the proportions of persons owning the farms they cultivate have increased, — a tendency directly away from assumed monopoly.

[2] In 1883, a bill passed by the Massachusetts Legislature, allowing the Somerville Wharf and Improvement Company two years further in which to organize as a corporation, was vetoed by Governor Butler, who stated as "the great and controlling objection to the bill, that it gives to the corporation the right to hold land in perpetuity, and to act for no other purposes whatever. This land, in the language of the books, would be held in mortmain, or by the dead hand."

put by Mr. Justice Field,[1] "if the policy of the State does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations, to be formed only by general law."

The question presented in the case, from which this quotation is made, was as to the right of a Pennsylvania land company to acquire and hold lands in the Territory of Colorado. By the Act of Congress then in force, the legislatures of the several Territories in the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits. The contention was that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The court disposed of this contention by holding that such a policy was not deducible from the legislation upon the subject, and referred to the fact that telegraph companies did business in the Territories before any law was passed there authorizing the formation of such companies.[2]

There may, however, be some circumstance in connection with the absence of legislation in a State authorizing the formation of

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[1] Cowell *v.* Springs Co., 100 U. S. 55.

[2] An instance may be cited where a failure to appreciate or apply the doctrine of this case led to an erroneous conclusion. Revised Statutes of Illinois, 1874, ch. 32, § 26, provides that foreign corporations doing business in the State shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the laws of the State, and shall have no other or greater powers. In United States Mortgage Co. *v.* Gross, 93 Ill. 483, it was held that § 1 of the chapter in question, setting forth that "corporations may be formed in the manner provided in this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money;" taken in connection with § 26 of the statute and the rule against perpetuities, operates to exclude foreign corporations from loaning money in the State. This decision was overruled in Stevens *v.* Pratt, 101 Ill. 206, the obvious fact being recognized that the language used in § 1, "Corporations may be formed in the manner provided in this act, for any lawful purpose," etc., does not exclude corporations formed under some other act.

corporations to transact a particular business which clearly indicates a legislative policy to prevent foreign corporations from transacting the business in question in the State. Thus, in the Texas case of Empire Mills *v.* Allston Grocery Company,[1] the defendants, who were citizens of Texas, had formed a corporate organization under a general law of the State of Iowa for the purpose of carrying on a mercantile business in the State of Texas. The constitution of Texas prohibits the creation of private corporations except under general laws. By an act of the legislature provision was made for the creation and operation of mercantile companies. This provision was subsequently repealed. The repeal, it was held, was a denial of the right to form, and a prohibition of the operation of such corporations in Texas. The Statute granted the privilege and then revoked it, thereby superseding the rule of comity. The court accordingly refused to recognize the legality of the corporation, and the defendants were held liable as partners to the plaintiff.

The question of the public policy of a State in the matter of the holding of lands for speculation or revenue by a foreign corporation has been directly presented and decided in Illinois, New York, New Hampshire and Ohio.[2]

In the case of Carroll *v.* East St. Louis,[3] a Connecticut land company had purchased real estate in Illinois, which it subsequently sold and conveyed to the city of East St. Louis. The plaintiff, who claimed under the grantor of the land company, brought a suit of ejectment against the city, contending that it was against the public policy of the State of Illinois to permit a foreign corporation, created for the sole purpose of buying and selling lands, to take title to land in Illinois. At the outset of the discussion the court properly limited itself to a consideration of the legislation applicable to the subject. "In this investigation," the court said, "it must be remembered that the law-making power of the State, where the authority is proposed to be exercised, is alone invested with the authority, and must determine its public policy. With this power the courts have not been intrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it. The public policy of the State may be

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[1] 15 S. W. Reporter, 200, 505.

[2] Lumbard *v.* Aldrich, 8 N. H. 31; American Bible Society *v.* Marshall, 15 Ohio St. 537; *supra*, p. 94; N. H. Land Co. *v.* Tilton, 19 Fed. Rep. 73.

[3] 67 Ill. 568.

ascertained by reference to the general course of legislation, either by prohibitory or enabling acts, or by its general course of legislation upon a given subject." It appeared by reference to the general laws authorizing the formation of corporations for various purposes, as well as from many special laws, that the legislature has restricted the power of corporations organized thereunder to hold real estate, either to a specified amount in value or in quantity, or to such as might be necessary to carry on the business for which they were chartered; and in some cases, where corporations had been authorized to receive donations of lands, it was provided that they should sell the same in three, five, seven, or ten years at the most. The court came to the conclusion that these restrictions unmistakably showed a settled policy, on the part of the legislature, that no means should be possessed by corporations, whether as the primary or auxiliary purpose of their creation, to hold lands in perpetuity. It was said that the legislature had in other modes, and on many occasions, — as, for example, in abolishing entails, — manifested a determination that perpetuities in real estate should not exist in the State. It was accordingly held that it was against the policy of the State to permit a foreign land company to purchase lands in Illinois, because it might hold such lands in perpetuity.[1]

The soundness of this conclusion may well be doubted. It may fairly be asserted that the restrictions upon corporate ownership of real estate imposed by the legislature, in place of indicating the policy inferred by the court, were intended merely to confine corporations to the purposes of their incorporation, and to secure a prudent management of their funds, by forbidding them to invest in real estate except within certain defined limits. The restriction of the right to acquire real estate contained in the National Banking Act is so interpreted. In referring to similar restrictions in the charter of a State bank, Chancellor Kent speaks of them as "only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations."[2] In

[1] NOTE. — In pursuance of this supposed policy, the same court has held that a foreign trust company could not be a trustee of real estate in Illinois. U. S. Trust Co. *v.* Lee, 73 Ill. 142.

It also held void a devise to a foreign Bible society, on the rule adopted in Carroll *v.* East St. Louis; Starkweather *v.* American Bible Society, 72 Ill. 50; but in a subsequent case a similar devise to a Wisconsin corporation was sustained. Female Academy *v.* Sullivan, 116 Ill. 375.

[2] Silver Lake Bank *v.* North, 4 Johns. Ch. 370.

the well-known case of Lathrop *v.* Commercial Bank,[1] the court, speaking of the fact that most acts of incorporation in Kentucky concede a special authority to purchase land for specified purposes, say: "That course of legislation has arisen either from a prevailing opinion that statutory corporations in this country shall possess no other powers than those expressly granted, or from a prudential determination to limit and define their rights and capacities with precision, and especially in relation to the purchase of real estate." Beyond this, mere ownership by a corporation of real estate in fee is not within the rule against perpetuities.

Still, it may be urged that, admitting technically such ownership does not create a perpetuity, nevertheless it is a fair inference that the State imposed upon her corporations the restrictions referred to in order that land might not, except in certain specified cases, be held in mortmain by an immortal being. The answer to this would seem to be that it is not reasonable to draw such an inference, because there is no necessity for the adoption of the mortmain policy or laws in this country. Land with us has not the privileges which were attached to it in feudal times in the country where the mortmain laws originated; and the reserved power of the State to alter or repeal corporate charters is ample to ensure any needed regulation or control of corporate ownership of real estate.

In Christian Union *v.* Yount,[2] the question was as to the validity of a devise of real estate in Illinois to a missionary society incorporated under the laws of New York. Carroll *v.* East St. Louis was quoted as authority for the broad contention that foreign corporations were prohibited by the settled policy of the State of Illinois from taking, purchasing, or holding lands within its limits. The court, however, held that the decision in this case did not conclude the point involved in the case before it, inasmuch as it appeared that, under the general laws of Illinois, domestic missionary corporations had power to take and hold real estate; and it was decided that the existence of a public policy forbidding a foreign missionary corporation to take or hold real estate in Illinois could not be inferred from the general course of legislation or judicial decisions in that State.

Upon the same ground, it was held in the recent case of Taylor

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[1] 8 Dana (Ky.), 114.
[2] 101 U. S. 352.

v. Alliance Trust Company,[1] that a foreign corporation may hold real estate in Mississippi. Under the Statutes of this State, domestic corporations are, with a few exceptions, authorized to hold real property to any amount. "It is idle," say the Court, "to talk of the existence of a public policy against ownership of lands by corporations, in the light of this legislation. No distinction is made between foreign and domestic corporations."

In Lancaster *v.* Amsterdam Improvement Company,[2] the New York Court of Appeals, reversing the decision of the General Term, held that under the laws of New York, a foreign corporation formed to deal in the purchase and sale of real estate, can transact its corporate business in that State. The opinion of the General Term went upon the ground, in substance, that the right of the corporation to acquire, hold and convey land within the State was to be determined by reference to two general statutes, which were taken to be the only statutes recognizing the right of foreign corporations to take and hold real property in the State, and by reference also to certain special legislation. The first statute, passed in 1877, authorized a foreign corporation to purchase at a sale under the foreclosure of a mortgage or under a judgment held by it, to hold the land purchased for not exceeding five years, and to convey it. The second, passed in 1887, authorized a foreign corporation doing business in the State to acquire such real property as might be necessary for its corporate purposes in the transaction of its corporate business in the State. The last statute, it was thought, was not broad enough to authorize a foreign corporation to take, hold and convey real estate as a business and for the purpose of speculation; and the first statute was deemed to negative the idea that a foreign corporation has such power. No authority being conferred by the general laws on the subject, it was inferred from numerous special acts of the legislature, authorizing certain foreign corporations to acquire lands by purchase or devise, to be the policy of the State not to permit such corporations to take, hold and convey lands in the State, without being specially authorized to do so. It was said, *arguendo*, that domestic corporations formed for purchasing, holding, improving and conveying real estate are limited in the amount which they may hold to $1,000,000, unless the corporation is organized for the purpose of erecting in a city a building to be rented

[1] 15 Southern Reporter, 121. See also, Reorganized Church, &c. *v.* Church of Jesus Christ, 60 Fed. Rep. 937.

[2] 140 N. Y. 576.

for offices and stores; but if foreign corporations may legally acquire, hold and convey land in the State at pleasure, there is no limitation upon the amount which they may acquire and convey, except their ability to purchase and pay for land.

The Appellate Court declared that it was "not confined to any such narrow ground as a construction of the particular acts referred to, and that in its judgment the learned General Term justices, if they had not overlooked, had failed to give due weight and significance to other provisions upon the statute books. A general law passed in 1892 accords to all foreign stock corporations the same right to transact their business in the State as domestic corporations have, if it be one which the latter may also lawfully transact, and provided there has been compliance with certain stated requirements.[1] Another general law provides for the formation of domestic corporations to carry on "any lawful business." Dealing in the purchase and sale of lands is held to be a lawful business. While the Statute of 1877 contains a limitation upon the right of foreign corporations to hold real property, with respect to time, the subsequent act of 1887 is in the direction of removing such or any limitation, and, finally, the Statute of 1892 allows all foreign corporations to do business in the State, upon compliance with conditions named, and places them upon a similar footing with domestic corporations as to the transaction of corporate business. The special legislation which has been procured by foreign corporations does not, it is held, indicate any policy of the State in the matter. If special enabling acts have been procured, in particular cases, the Court say, they do not necessarily disprove the general right. Prudence and cautious

[1] The material part of the law of 1892 is as follows:

No foreign stock corporation other than a monied corporation shall do business in this State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may lawfully be carried on by a corporation incorporated under the laws of this State for such or similar purposes. . . . The Secretary of State shall deliver such certificate to every such corporation so complying with the requirements of law. . . . No foreign stock corporation doing business in this State without such certificate shall maintain any action upon any contract made by it in this State until it shall have procured such certificate. Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the State, and a place within the State which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the State. The person so designated must have an office, &c.

counsels may have dictated their procurement. To the suggestion that if foreign corporations may legally acquire and convey land in the State at pleasure, there is no limitation upon the amount which they may hold, it is answered that it is always within the power of the legislature to interfere and to regulate, if, by the magnitude of the business, the public interests are affected and seem unduly threatened. The case, it is held, does not fall within those which the courts have decided to be against public policy; the business is not immoral in itself, and it is not prohibited by legislation.

The legislation under which this case was decided is quite similar to that existing in some of the States, where as yet no judicial definition of State policy on the subject under discussion has been made; and if the occasion shall arise there for obtaining such a definition, the opinion of the New York Court will doubtless carry much weight.

The enlightened manner in which this court from its earliest history has dealt with questions involving corporate rights and privileges has been an important factor in the maintenance and growth of the commercial supremacy of a great State. Seventy-five years ago, Chancellor Kent said,[1] when the standing of a foreign corporation in the Equity Court of New York was questioned, "This court ought to be as freely open to such suitors as a court of law, and it would be most unreasonable and unjust to deny them that privilege. They might well exclaim:

> 'Quod genus hoc hominum? . . .
> . . . hospitio prohibemur arenæ.'"

Not only has the day gone by when foreign corporations, merely as such, may properly be looked upon with suspicion, but at the present time, the assimilation of real to personal property, for all the purposes of commerce, is such that the necessity for restraining laws has to a very great extent ceased. Judicial construction of legislation upon this subject should therefore be along broad and liberal lines, and not narrowed by the notion that foreign corporations "carry a black flag," or influenced by the ancient learning of English statutes inapplicable to our situation, and never adopted as a part of the law of our land.

In conclusion, it may be well to call attention to a question which might in some contingencies be of great practical importance to a corporation compelled to defend its title to lands in a

[1] Silver Lake Bank *v.* North, 4 Johns Ch. 370

State against an attack based on the contention that the public policy of the State forbade the corporation to take or hold the lands in question. In such a controversy, the right to choose the forum might be decisive of the case. Under the provisions of the Act of Congress declaring that the laws of the several States, except when the Constitution, treaties, or statutes of the United States otherwise require, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, the construction given to a State statute by the highest judicial tribunal of such State is generally followed without question by the Federal courts in deciding matters to which the local statute is applicable. If a foreign corporation should acquire real property in a State after the court of last resort in that State had clearly declared the public policy of the State to be opposed to the acquisition of real estate by such a corporation, a Federal court would, if the case should be presented to it, accept the rule of policy announced by the State court as a part of the legislation of the State upon the subject. But suppose the decision of the State court is made after the corporation has acquired lands in the State, and the question of the title of the corporation is then litigated in a Federal court by original suit therein, or by removal of the cause from the State court; is the Federal court bound to accept and follow the construction of the statutes in question adopted by the local court?

On this point, Mr. Justice Harlan, in Christian Union *v.* Yount, *supra*, said, after alluding to the general rule: "But how far the Federal courts, in the ascertainment and enforcement of property rights depended upon the statute law, or the public policy of a State, are bound by the decisions of a State court, rendered after such rights were acquired or became vested, is a different question, and one of the gravest importance." The rule upon this subject he did not discuss, because the local decisions upon which counsel relied did not in the view of the court conclude the precise point involved in the case.

In a later case,[1] however, the rule is stated to be that "where contracts and transactions have been entered into, and rights have accrued thereon, when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a

[1] Burgess *v.* Seligman, 107 U. S. 20, 23.

different interpretation may be adopted by the State courts after such rights have accrued." It is said that "as the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

Arthur M. Alger.

TAUNTON, Mass.